IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-309

ANDREW RENFRO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Andrew Renfro, petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on June 19, 1979.

Petitioner's Petition for Rehearing and for Rehearing *En Banc* was denied by the United States Court of Appeals for the Sixth Circuit by Order dated July 31, 1979.

OPINION AND ORDER BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not yet been published. It is printed as Appendix A below.

The Order of the Court of Appeals for the Sixth Circuit dated July 31, 1979 denying Petition for Rehearing and for Rehearing *En Banc* is printed as Appendix B below.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on June 19, 1979. See Appendix C below.

Petitioner's Petition for Rehearing and for Rehearing *En Banc* was denied by Order of the Court of Appeals for the Sixth Circuit dated July 31, 1979. See Appendix B below.

Jurisdiction is conferred upon this Court by 28 USC §1254.

QUESTIONS PRESENTED

I.

Whether the trial judge impermissibly shifted the burden of proof to petitioner when he instructed the jury that 'if it appears from the evidence in the case the defendant has failed to provide explanation as to the

source or sources of any increase in his net worth, then the jury may consider such failure as one of the circumstances in evidence in the case'.

II.

Whether the petitioner was prejudiced when the trial judge instructed the jury that the jury could consider the reasonableness of petitioner's explanation of his increase in net worth as bearing on 'consciousness of guilt' and that 'the significance to be attached to any such evidence are matters exclusively within the province of the jury'.

III.

Whether petitioner was prejudiced when the government attorney stated to the jury in argument and when the trial judge instructed the jury that the federal income tax is levied on all income 'whether legal or illegal' when there was no evidence whatever that petitioner had sources of illegal income.

IV.

Whether there was a failure of proof on trial when the government's case for income tax evasion based on the increase in net worth theory was based on documents bearing the name of petitioner and signatures spelling out petitioner's name without any proof that the signatures were those of petitioner and without any proof that petitioner was the person who participated in the transaction represented by the documents.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> 'No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .'

STATEMENT OF FACTS

Petitioner was charged in a two count indictment with the commission of the offenses of (1) failure to file an income tax return for the calendar year of 1971 contrary to 26 USC 7203; and (2) failure to file an income tax return for the calendar year 1972 and attempting to evade and defeat the payment of income taxes owing and failing to pay taxes owing by concealing his assets, contrary to 26 USC 7201.

The case was tried to a jury.

The jury convicted petitioner on both counts.

The court sentenced petitioner to a term.

On the tax evasion charge, the government relied on the increase in net worth theory and adduced proofs in conformity therewith. To prove that petitioner's net worth had increased, the government introduced into evidence many documents which reflected some sort of buying transaction: purchase of real estate, taking of loans upon mortgage, buying furniture and clothing, etc. Petitioner stipulated that these documents could come into evidence without a witness being called to testify that they were kept in the ordinary course of business, etc. However, petitioner did not stipulate that the documents referred to any transactions to which

petitioner was a party. And the trial judge carefully instructed the jury 'that the mere fact that an exhibit, let's say a receipt, shows a purchase, it does not necessarily mean that this purchase was made by or paid for by [petitioner]' (T33-34).*

Without these myriad documents, the government could not prove the case against petitioner on the tax evasion charge. Yet — and this is the important point — save in the case of one document pertaining to the purchase of a swimming pool, the government called no witness to prove either that the signatures appearing on the said documents were those of petitioner or to identify petitioner in court as the person who participated in the transaction represented by the document in question.

Petitioner gave leads to the government that he was supported by two girl friends during this period and petitioner called a lawyer to testify that he had been consulted by petitioner on the question whether certain expenditures made by him were income since he was being supported by two girl friends.

The trial judge instructed the jury, *inter alia*, as follows:

> (1) that 'if it appears from the evidence in the case the defendant has failed to provide explanation as to the source or sources of any increase in his net worth, then the jury may consider such failure as one of the circumstances in evidence in the case'; (T481)

---

* The T in the parentheses refers to the Transcript of testimony adduced on trial of this case; the numbers to the pages within.

(2) that the jury could consider the reasonableness of petitioner's explanation of his increase in net worth as bearing on 'consciousness of guilt' and that 'the significance to be attached to any such evidence are matters exclusively within the province of the jury'; (T469)

(3) that the federal income tax is levied on all income 'whether legal or illegal'. (T480)

The government attorney argued to the jury that 'it is irrelevant whether the source of income is legal or illegal' (T435).

There was no evidence in the case whatever to suggest that petitioner's income was illegal.

REASONS FOR GRANTING THE WRIT

I.

WHEN USING THE NET WORTH METHOD OF PROOF, THE GOVERNMENT MUST NOT ONLY PROVE THE INCREASE IN NET WORTH BUT ALSO THAT THE INCREASE RESULTED FROM UNREPORTED INCOME; THE ACCUSED NEED NOT PROVE THAT THE INCREASE IN NET WORTH COULD BE SATISFACTORILY EXPLAINED AS DUE TO SOURCES OTHER THAN TAXABLE INCOME.

The gravamen of the tax evasion charge laid against petitioner was that petitioner had taxable income which he failed to report and upon which he failed to pay the tax provided by law.

The government undertook to prove this charge by adducing proof that during the period in question, petitioner's net worth increased in a certain dollar amount, and then the jury was asked to infer that this increase in net worth was due to unreported taxable income which petitioner received.

The law accorded petitioner an opportunity to explain the increase in net worth in terms innocent of violation of the revenue laws, but the petitioner was not required to prove the innocent nature of the increase in net worth; the burden was the government's to prove that it was due to unreported taxable income.

The fact of the matter remains, that the jury might not have believed petitioner's explanation of the increase in his net worth, and still the jury might not have been satisfied beyond a reasonable doubt that the increase in petitioner's net worth was due to unreported taxable income.

However, the trial court's instruction that 'if it appears from the evidence in the case the defendant has failed to provide explanation as to the source or sources of any increase in his net worth, then the jury may consider such failure as one of the circumstances in evidence in the case' shifted the burden of proof to the petitioner in that it invited the jury to find that the increase in petitioner's net worth was due to unreported taxable income if the petitioner failed to provide an explanation as to the source or sources of the increase in net worth. This violated the basic due process requirement that the government must prove each and every fact necessary to constitute the offense charged beyond a reasonable doubt. *In re Winship*, 397 US 358 (1970); *Mullaney v Wilbur*, 421 US 684 (1975).

It will not do to say that the trial judge removed any prejudicial effect worked by the instruction above quoted when he continued on to say:

> ' . . . bearing in mind always that the law never imposes upon a defendant in a criminal case the burden or duty *to offer or produce any evidence*, since the burden is always upon the Prosecution to establish beyond a reasonable doubt from the evidence in the case every essential element of the crime charged, including of course the claim that any increase in the defendant's net worth was from taxable sources'. (T481) [Emphasis added.]

This for two reasons. First, the offending instruction clearly referred to petitioner's failure to provide a *satisfactory* explanation of the sources, and the corrective instruction mentions that burden to produce an explanation is not imposed upon the accused but does mention that a burden to *prove* an explanation is never imposed upon the accused.

And second, it cannot be determined at this time whether the jury followed the offending instruction or the corrective instruction.

The question must be asked: if there is no burden on the accused to produce any evidence, why tell the jury that the accused's failure to produce evidence may be considered by the jury as 'one of the circumstances in evidence in the case'?

At the very least, it must confuse the jury.

ooo

II.

ACCORDING TO THE TRIAL JUDGE'S INSTRUCTIONS, PETITIONER COULD EXONERATE HIMSELF OF THE CHARGE OF INCOME TAX EVASION BY GIVING A SATISFACTORY EXPLANATION OF HIS INCREASE IN NET WORTH, BUT UPON PAIN THAT AN UNSATISFACTORY EXPLANATION CAN BE USED BY THE JURY TO DETERMINE THAT THE INCREASE IN NET WORTH WAS DUE TO UNREPORTED TAXABLE INCOME BECAUSE AN UNSATISFACTORY EXPLANATION CAN BE REGARDED BY THE JURY AS CONSCIOUSNESS OF GUILT. THIS CANNOT BE THE LAW.

When the government proceeds by the increase in net worth method to prove a charge of tax evasion, the accused may give leads to the government to sources explanatory of the increase in net worth. *Holland v United States*, 348 US 121 (1954).

It may be true that 'once the Government has established its case, the defendant remains silent at his peril', *Holland v United States, supra*, at 138-139, but this does not mean that if the accused gives the government leads to possible sources of increase in net worth or otherwise attempts to make explanation of the increase and such are unsatisfactory, that the unsatisfactoriness of the explanations or the leads can make the government's case.

The government must prove a certain increase in net worth and then the jury must be convinced beyond a reasonable doubt that the increase is due to unreported

taxable income. The jury may believe that the accused had an increase in net worth, the jury may deem unsatisfactory the accused's explanation of the increase and still the jury would be at liberty to find that they were not convinced beyond a reasonable doubt that the increase was due to unreported taxable income.

In this context, the trial judge instructed the jury as follows:

> 'As I stated to you before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.
>
> 'When a defendant personally or through a party acting within the scope of a Power of Attorney voluntarily and intentionally offers an explanation for his sources of income, you may take into consideration whether that explanation was reasonable or accurate in determining consciousness of guilt.
>
> 'Whether or not evidence as to a defendant's voluntary explanation or the explanation by one acting within a Power of Attorney points to a *consciousness of guilt,* and *the significance to be attached to any such evidence, are matters exclusively within the province of the jury.'* (T468-469) [Emphasis added.]

This instruction effectively shifted the burden of proof onto the petitioner.

Petitioner was put in an impossible situation. If he remained silent, it was at his peril that the jury might believe circumstantially that the increase in his net worth was attributable to unreported taxable income. And if he attempted to explain the increase and the jury

found his explanation to be unreasonable or inaccurate, the jury could regard this as consciousness of guilt on the part of petitioner and the jury could attach *any* significance they pleased upon it including the interpretation that might not otherwise be there that the source of the increase in net worth was unreported taxable income.

°°°

III.

PETITIONER WAS ACCUSED OF HIDING HIS ASSETS AND AVOIDING PAYMENT OF TAXES ON UNREPORTED INCOME, AND THIS ACCUSATION WAS BURDEN ENOUGH FOR PETITIONER TO BEAR WITHOUT THE INNUENDO OF GOVERNMENT'S ATTORNEY AND OF THE TRIAL JUDGE THAT PETITIONER'S INCOME MIGHT BE ILLEGAL.

There was no evidence whatever that petitioner's income was from illegal sources.

Still, the government's attorney stated to the jury that 'it is important to know, that it is irrelevant whether the source of income is legal or illegal' (T435).

And the trial judge instructed the jury that 'the jury will bear in mind that the federal income tax is levied on income derived from compensation for personal services of every kind, whether legal or illegal, and in whatever form paid; also on income from interest, dividends, gains, profits, and the like'. (T480).

This was equivalent to the entry in the ship's log made by the first mate who wanted to asperse the captain but who shunned falsification: 'The captain was sober today'.

And it effectively deprived petitioner of a fair trial under the *5th Amendment.*

IV.

WHEN THE GOVERNMENT FAILED TO ADDUCE EVIDENCE THAT THE SIGNATURES ON THE VARIOUS DOCUMENTS INTRODUCED INTO EVIDENCE WERE THE SIGNATURES OF PETITIONER AND WHEN THE GOVERNMENT FAILED TO CALL WITNESSES WHO WERE ABLE TO IDENTIFY PETITIONER AS THE PERSON WHO PARTICIPATED IN THE TRANSCTIONS REFLECTED BY THE DOCUMENTS AS ANDREW RENFRO, THE GOVERNMENT FAILED TO PROVE THE CHARGES AGAINST PETITIONER.

In order to prove that petitioner had hidden some of his assets and to prove that petitioner had an increase in net worth of a certain sum, the government introduced into evidence quite a number of documents — deeds to real property, applications for mortgage loans, receipts for the purchase of furniture, furs, clothes, cars and the like.

To save time, petitioner's trial counsel stipulated that these documents were kept in the ordinary course of business and that they were 'authentic'. What counsel meant was that the documents were not manufactured for trial, that they actually came out of the business records of the various business establishments involved, but counsel did not stipulate or concede that the documents related in any manner to petitioner, and counsel asked the trial judge to so instruct the jury, which the judge did as follows:

> MR. LEE [defendant's counsel]: Your Honor, I agree that this exhibit is admitted into evidence by stipulation, but I think the nature of the stipulation should be made clear to the jury

with regard to this exhibit and other exhibits stipulated to by the defendant.

THE COURT: Ladies and gentlemen of the jury, the parties have agreed, and I will tell you what that agreement now is in the form of an instruction to you.

As you have been notified, there will be many exhibits, documents, introduced. The parties have agreed as to the authenticity of those documents — that is, that they are authentic, valid documents. Someone doesn't have to get on the stand and testify, "yes, this is a record that I kept," or that, "This was kept in the normal course of business," and the like. However, because they are introduced as evidence does not mean that you must accept them at face value. You have the right to weigh the exhibits along with other evidence in the case, just as you weigh any testimony that is given. It is up to you as to how much weight and value you are going to give to any particular exhibit and the contents of that exhibit.

Further along the way, I will be charging you that some exhibits are to be received only for certain purposes. And I mentioned yesterday, for example, that the mere fact that an exhibit, let's say a receipt, shows a pur- (T33) chase, it does not necessarily mean that this purchase was made by or paid for by Mr. Renfro. That has to come through other evidence, through signatures, for example, through testimony of witnesses, or, again, by reasonable inferences that you are permitted to draw. All right, let's proceed now. (T34)

In his charge to the jury, the trial judge adverted to the subject of stipulations again:

> 'With respect to stipulations, I would again have you bear in mind something that I told you earlier in these proceedings. You will recall that many exhibits were introduced upon the stipulation of the Defense Counsel. I repeat to you now that counsel's stipulation went only to the authenticity of the document in question; in other words, counsel was stipulating that the document was authentic and it was not necessary, therefore, for the Government to call a witness to the stand to establish, for example, that he had prepared the document or had seen someone else prepare it 'and that it had been kept on file in the regular (T465) course of business.
>
> Whether these documents so stipulated to are evidence of payments made by Andrew Renfro is a matter for you to decide from the other evidence, if any, and from the inferences you may draw from such evidence.
>
> 'In that vein, I further instruct you that my rulings regarding the admissibility of exhibits mean only that I hold such exhibits are authentic and are relevant to issues in the case. However, it is your prerogative to give exhibits the weight and value you find they deserve. One further caution is that you are to consider exhibits only for the purpose for which they were admitted and for no other purpose. And that is true as to other evidence that was permitted in this case for a particular purpose. When that was done, you were advised, and I repeat now that you may consider such evidence only for the particular purpose for which it was admitted and for no other purpose.' (T446)

The government adduced no evidence whatever that any signature appearing on any of the documents was the signature of petitioner; nor did the government call any witnesses who identified from the witness stand petitioner as the person who participated in the transaction reflected in the document as the Andrew Renfro alluded to in the document.

The documents might be 'authentic' in terms of not having been manufactured for trial and as actually made in the course of someone's business, but unless they are shown to be somehow related to the Andrew Renfro who was the defendant, the documents had no relevancy and should have been excluded from evidence when the government failed to establish such relevancy. *McCormick, EVIDENCE (2d Ed)*, pp 543-547; *United States v Wagner*, 475 F2d 121, 123 (CA10 1973); *Continental Baking Company v Katz*, 439 P2d 889, 897 (Cal 1968); *Palfy v Rice*, 473 P2d 606, 612 (Alaska 1970); *United States v Duncan*, 503 F2d 1021, 1022 (CA10 1974); *McGowan v Armour*, 248 F 676, 677 (CA8 1918).

Had the government introduced into evidence a known specimen of petitioner's signature and then had an expert compare the known signature with those appearing on the exhibits, or if the court had instructed the jury that they could compare a known signature to those appearing on the exhibits to determine whether the signature on the exhibits were those of petitioner, the documents could have been authenticated. *Brandon v Collins*, 267 F2d 731 (CA2 1959); *United States v Cashio*, 420 F2d 1132 (CA5 1970); *Strauss v United States*, 311 F2d 926 (CA5 1963).

However, the government did not do this.

Had the government called witnesses who could testify that they saw petitioner sign the exhibits, the documents could have been authenticated. *Durham v State*, 422 P2d 691 (Wyo 1967); *Cottingham et al v Doyle*, 202 P2d 533 (Mont 1949).

However, the government did not do this.

Hence, the government failed to prove its case. Petitioner was convicted in the absence of evidence of his guilt. This was a violation of due process. *Thompson v. Louisville*, 362 US 199 (1960).

RELIEF REQUESTED

For the reasons above set forth, petitioner respectfully prays this Court issue its Writ of Certiorari in this case to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

OPINION

(United States Court of Appeals
For the Sixth Circuit)

(Decided and Filed June 19, 1979)

United States of America, *Plaintiff-Appellee*, v. Andrew Renfro, *Defendant-Appellant*.

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Before: Lively and Merritt, Circuit Judges and Cecil, Senior Circuit Judge.

Cecil, Senior Circuit Judge. This is an appeal by the Defendant-Appellant, Andrew Renfro, from his conviction in the United States District Court for the Eastern District of Michigan, on two counts of an indictment charging violations of the Federal Income Tax Laws.

Count one of the indictment was framed under Section 7203 of Title 26, United States Code, and alleged that the appellant wilfully and knowingly failed to file an income tax return for the calendar year 1971, although he had received a gross income of $13,004.83. Count two of the indictment was framed under Section 7201 of Title 26, United States Code, and alleged that the appellant attempted to evade the payment of $24,753.91 as the income tax due on his income of $65,387.82 during the calendar year of 1972. It is alleged in this count that the appellant had attempted to evade

payment of this tax by failing to file an income tax return, by failing to pay the tax, by concealing his assets, "covering up the sources of his income, by handling his affairs to avoid making the records usual in transactions of the kind, and by other conduct * * *" The charges alleged in the counts of the indictment state offenses within the Sections of the statutes, stated *supra*.

It is claimed on behalf of the appellant that the trial judge erred (1) in permitting improper and prejudicial argument of the prosecuting attorney in his final argument to the jury; (2) in giving erroneous instructions to the jury; and (3) in the admission of evidence to the jury. No objections were made, by counsel for the appellant, to any of these alleged errors during the trial.

Accordingly, an error to require reversal must be "plain error" within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure.

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Rule 52(b)

The Court has applied this rule as indicated in the following statement,

> "It is a long-standing rule of trial practice that a defendant must object to improper statements made by opposing counsel during closing argument to preserve these objections for appeal. (Citations omitted) The purpose of this rule is to allow the trial judge to attempt to correct the error, if any was committed. Where no objection is made, then the court on appeal shall intercede only where the error would 'seriously affect the fairness, integrity or public reputation of judicial proceedings'." *U.S.* v. *Black*, 480 F.2d 504, 506-507 (6th Cir. 1973)

Specifically, it is charged that the prosecutor made improper argument in the following categories: (1) He expressed his personal opinion of the guilt of the appellant; (2) he made misstatements of law and fact; (3) he shifted the burden of proof to the appellant; and (4) he allegedly attacked the appellant for exercising his right to employ counsel.

Counsel attempts to support his argument by taking sentences at random from the argument. Without objections being made, the trial judge had no opportunity to pass on the question and determine whether the prosecutor was departing from the evidence or the record. We have carefully examined the argument of the prosecutor as a whole and cannot find that he indulged in any argument that was improper or in any event that would "seriously affect the fairness, integrity or public reputation of judicial proceedings." At the outset of his argument he very clearly explained to the jury that the burden was on the government to prove the appellant guilty beyond a reasonable doubt. In all of the challenged statements with reference to expressing a personal opinion of guilt, we find that the prosecutor was speaking from the evidence or inferences logically to be drawn therefrom.

Counsel for the appellant objects to the trial judge's instructions to the jury as follows: (1) That the income tax may be levied on income, whether legal or illegal; (2) that the appellant had a burden to explain the sources of his increased net worth; (3) that the jury could consider the reasonableness of the

appellant's explanation of his increase in net worth as bearing on his consciousness of guilt; and (4) that the trial judge failed to instruct the jury on the nature of the net worth method of proving the charge in count two of the indictment.

Not only did defense counsel not make any objection to the trial judge's instructions to the jury, but he indicated that he was satisfied with them. The trial judge met with counsel in chambers prior to final arguments and reviewed the instructions as he proposed to give them. After the instructions were given, before excusing the jury, but out of their hearing, the trial judge asked counsel if they were satisfied with the instructions, and Mr. Lee, defense counsel, said "Correct, your Honor."

We have examined the judge's instructions, as a whole, and consider that they were well adapted to the facts and law of the case. We do not find any error in the instructions, challenged by counsel, certainly not plain error.

The jury was instructed over and over that they should consider the evidence and that the burden was on the government to prove the defendant guilty beyond a reasonable doubt. It was a correct statement of law to instruct the jury that they could consider income whether legal or illegal. It is possible that the jury might have drawn some inference from the evidence that there was illegal income. We do not consider that any prejudice to the defendant could arise from this.

The judge did not instruct the jury that the defendant had a burden to explain his income. The substance of the instructions was that the defendant's explanation

was a matter of evidence which should be weighed with all other evidence admitted in the case. This evidence could be an affirmative explanation or the absence of one. We find no fault with the instruction that the jury could consider the reasonableness of the defendant's explanation as to his increase of net worth as bearing on his consciousness of guilt. In other words what credit did they attach to such explanation.

We consider that the trial judge made a very adequate and correct statement of the law of proving the charge in count two of the indictment, by the net worth method.

Another alleged error claimed on behalf of the appellant is directed at the admission of hearsay testimony at the trial. Thelma Harrison, the sister of the appellant, was asked if she had ever discussed with her brother the use of her name to make purchases for him. She replied,

> "I knew that he was using it but I asked him to discontinue the use of my name."

No objection was made to this testimony. Had an objection been made, the trial judge would have had an opportunity to pass on the admissibility of the testimony and instruct the jury accordingly. In view of other evidence on the subject of the use of her name to buy property and to order a pool and awnings, we do not consider that this constituted "plain error" justifying reversal under Rule 52(b), Federal Rules of Criminal Procedure.

After arguing the above issues on the basis that they constitute "plain error" since no objection was made to them during the trial, counsel now shifts his argument to the claim that appellant was deprived of "effective assistance of counsel" for the reason that defense

counsel did not, in violation of the Sixth Amendment, make objections as those issues arose during the trial. Counsel, on appeal, not the defense trial counsel, has combed the record with a fine tooth comb, so to speak, to find issues on appeal.

> "If, however, action that appears erroneous from hindsight was taken for reasons that would appear sound to a competent criminal attorney, the assistance of counsel has not been constitutionally defective." *Beasley* v. *United States*, 491 F.2d 687, 696 (See also, *McMann* v. *Richardson*, 397 U.S. 759)

The alleged errors do not pass the test of plain error, and we cannot say, looking back over the record, from our view of the evidence and the instructions of the trial judge, that any of those claimed errors would have been prejudicial to the appellant and would deny him a fair trial.

The standard for effective assistance of counsel is stated in *Beasley* v. *United States, supra*, at 696, as follows:

> "We hold that the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence." (Citations omitted)
>
> "Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in proper and timely manner." *Reece* v. *Georgia*, 350 U.S. 85 (1955); *Wilson* v. *Phend*, 417 F.2d 1197 (7th Cir. 1969).

We find no evidence and none has been called to our attention to the effect that defense counsel, through negligence or ineffectiveness, deprived the appellant of any defense either legal or evidentiary. From all that appears in the record, defense counsel was a well trained and experienced criminal trial lawyer. (He received the plaudits of government counsel, as a competent trial lawyer, at the opening of the prosecutor's rebuttal argument.)

We must conclude that, from the record, defense counsel met the standard of effective assistance of counsel.

We come now to a consideration of the evidence. Counsel for appellant claims that the convictions on both counts must be reversed for the reason that they are not supported by competent evidence. Specifically, he objects to the introduction of a number of business records which were offered in evidence as exhibits for the purpose of showing the appellant's increased financial resources and expenditures.

These exhibits were admitted by stipulation as authentic business records pursuant to Rule 803(6)[1]

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[1] "Records of regularly conducted activity. A Memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation in the case lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." Rule 803 (6) F.R.E.

Federal Rules of Evidence. Counsel now claims that these records were incompetent because appellant's name and/or signature was not separately authenticated by any evidence admitted at the trial. Defendant cites no evidentiary rule for the specific proposition that records stipulated to be authentic business records must have independent verification of the authenticity of signatures appearing thereon. Obviously no objection was made to the introduction of exhibits which were introduced by stipulation.

Objections were made to the introduction of exhibits 22a and 31 on the ground of relevancy. Counsel claims that this was a continuing objection to all of the exhibits. We find this claim to be without merit. We hold that the exhibits to which objection is now made were relevant and material and there was no error, plain or otherwise, in their introduction.

The trial judge clearly and correctly instructed the jury as to the use of such exhibits, as follows:

> "With respect to stipulations, I would again have you bear in mind something that I told you earlier in these proceedings. You will recall that many exhibits were introduced upon the stipulation of the Defense Counsel. I repeat to you now that counsel's stipulation went only to the authenticity of the document in question; in

other words, counsel was stipulating that the document was authentic and it was not necessary, therefore, for the Government to call a witness to the stand to establish, for example, that he had prepared the document or had seen someone else prepare it and that it had been kept on file in the regular course of business.

"Whether these documents so stipulated to are evidence of payments made by Andrew Renfro is a matter for you to decide from the other evidence, if any, and from the inferences you may draw from such evidence."

We conclude that, considering the evidence from the record as a whole, in the light most favorable to the government, there is ample competent evidence to support the verdict.

Judgment affirmed.

APPENDIX B

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed July 31, 1979)

United States of America, Plaintiff-Appellee v. Andrew Renfro, Defendant-Appellant

Before: Lively and Merritt, Circuit Judges and Cecil, Senior Circuit Judge.

On receipt and consideration of a petition for rehearing and a suggestion for rehearing en banc in the above-styled case; and

No judge in active service in this court having moved for en banc reconsideration and the petition having been referred to the panel which originally heard the case; and

Noting in said petition no issue of substance presented which was not taken fully into account prior to issuance of the court's opinion,

Now, therefore, said petition for rehearing is denied.

Entered by order of the Court
/s/ John P. Hehman
Clerk

APPENDIX C

NOTICE OF ENTRY OF JUDGMENT

(Filed June 19, 1979)

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO 45202

JOHN P. HEHMAN, CLERK

June 19, 1979

Mr. Carl Ziemba
Mr. James K. Robinson
Mr. Martin Reisig

Re: Case No. 78-5482
U.S.A., Plaintiff-Appellee, vs. Andrew Renfro, Defendant-Appellant.
Dist. Ct. No. 78-80228

Dear Counsel:

The Court today announced its decision in the above entitled case.

A copy of the Court's opinion is enclosed, and a judgement in conformity with the opinion has been entered today as required by Rule 36, Federal Rules of Appellate Procedure.

Each party will bear its own costs on this appeal.

Very truly yours,
John P. Hehman, Clerk
By: /s/ Betty Tibbles
Deputy Clerk

BT:jgc
Enclosure